U.S. Department of Labor

Board of Alien Labor Certification Appeals
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CASE NO: 1998-INA-202

In the Matter of

HONG VIDEO TECHNOLOGY
Employer

on behalf of

PINGJIANG LIU
Alien

Appearances: Lu Wang, Esq., Attorney for Employer and Alien

Certifying Officer: Floyd Goodman, Region IV

Before: Huddleston, Jarvis and Burke
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Hong Video Technology Inc.'s ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at

the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On June 26, 1996, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the Georgia Department of Labor ("GDOL") on behalf of the Alien, Pingjiang Liu. (AF 95-96). The job opportunity was listed as "Product Support/Electronic Engineer". The job duties were described as follows:

> To provide electronic engineering support to the service department. Specific duties include: utilize acceptable soldering/desoldering skills; read and follow schematic diagrams and blueprints; repair power supplies; perform all mandatory upgrades following the documented procedure; work without supervision on monochrome and color monitors; recognize all components color coding, making and identification symbols; complete repair paperwork as required; observe proper use of all test equipment and understand their functions; assist co-workers with troubleshooting when required; take over new product line or project held by other co-workers; cross reference parts by operating parameters to fine suitable replacements.

(AF 95). The stated job requirements for the position, as set forth on the application, included a "B.S. or equivalent" in Electronic Technology or Education Technology and 1 year of experience in the job offered. (Id.).

GDOL transmitted resumes from six U.S. applicants to the Employer. (AF 78-79). The Results of Recruitment Report indicated that none of the U.S. applicants were hired. (AF 100-104). The file was transmitted to the CO.

The CO issued a Notice of Findings ("NOF") on October 20, 1997, proposing to deny the

certification because the Employer's job requirements do not represent the actual minimum requirements in violation of Section 656.21(b)(5). (AF 74-77). The CO found that the Employer was not in compliance with the regulation because the Alien does not have the experience required
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by the Employer. The CO found that:

> The employer is requiring a Bachelor's degree in Electronic Technology or Education Technology and one year experience in the job offered, Product Support/Electronic Engineer. The Employer had the alien's educational credentials evaluated by Foreign Credential Evaluations Incorporated and their finding was that the alien had the equivalent of an Associate of Arts in Education Technology. Therefore, it is apparent that the alien does not meet the minimum requirements as listed on the ETA 750,part A and in the employer's advertisement and thus, the Employer has not documented the minimum acceptable requirements of the job. (AF 77).

The CO provided that the Employer could rebut this finding by documenting that these are the actual minimum requirements for the job and that the alien meets these requirements. Specifically, the CO requested that the Employer either prove that the Alien has the required Bachelor's degree or drop the requirement and readvertise. (Id.)

The Employer submitted its rebuttal dated December 18, 1997.[1] (AF 40-71). The Employer argued, through its attorney, that the Alien possesses the equivalent of the required Bachelor degree, (AF 40). The Employer stated that "[s]uch equivalency is demonstrated through the alien's extensive work experience plus his formal education preparation." (Id.). The Employer submitted a copy of a 25 page Education & Experience Evaluation Committee Report prepared by the Center for Education and Experience Evaluation, "a division of the International Education Systems (IES), Inc., which testifies through expert opinions the qualifications of the alien as having an equivalent of a U.S. baccalaureate degree in Electronics Engineering (Technology)." (Id.). The Employer further argued that the minimum requirements of the job are consistent with the Dictionary of Occupational Titles ("DOT") code with carries an SVP of 8. (AF 40-41).

The CO issued a Final Determination ("FD") on January 26, 1998, denying certification. (AF 38-39). The CO found that the Employer had failed to document the minimum requirements of the job because the Alien did not have the educational degree required by the Employer. (AF 39). The CO stated that allowing "[a] combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers." (Id.). The CO noted that the first evaluation service used by Employer found that the Alien did not have the equivalent to a Bachelor's degree and noted that

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[1] On November 24, 1997,the CO granted the Employer an extension of time to rebut until December 24, 1997. (AF 72).

"because the employer/attorney used a different Evaluation service for the second evaluation it would appear that the employer has sought out a service that would provide a favorable evaluation tailored to the aliens qualifications." (Id.).

The Employer filed a Request for Review on February 26, 1998. (AF 1-37).

Discussion

The issue presented in this case is whether Employer violated section 656.21(b)(5) by requiring an employment prerequisite of U.S. workers not required of the Alien. Section 656.219b)(5) provides that:

> The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that is not feasible to hire workers with less training or experience than that required by the employer's job offer.

An employer is not allowed to treat an alien more favorably that it would a U.S. worker. Boca Raton Community Hospital, 95-INA-387 (Feb. 27, 1998); ERF Inc., d/b/a/ Bayside Motor Inn, 89-INA-105 (Feb. 14, 1990). It is incumbent upon an employer to state the minimum requirements for a position on the application form. National Pathology Laboratories, Inc. 90-INA-132 (April 30, 1991). An employer must state and advertise accurately and completely the actual minimum requirements for the position so that the labor market can be adequately tested. National Pathology Laboratories, Inc., 90-INA-132 (April 30, 1991); Bell Communications Research, Inc., 88-INA–26 (Dec. 22, 1988) (en banc); O'Malley Glass& Millwork Co., 88-INA-49 (Mar. 13, 1989).

In the present case, the Employer requires U.S. applicants to have a "B.S. or equivalent" degree in Electronic Technology, or Education Technology. The Alien has a Diploma from the Department of Education Technology, Nanjing Normal University, People's Republic of China. The Employer submitted with its application a letter from the Foreign Credential Evaluations, Inc. certifying that the Alien's degree was equivalent to the degree, Associate of Arts in Education Technology. (AF 123). The CO requested documentation that the Alien' degree is equivalent to a B.S. Degree because, if the two degrees are not equal, then the Employer would be showing the Alien favorable treatment by hiring the Alien without a "B.S. or equivalent" degree and not affording the same opportunity to U.S. applicants. Such action would be a violation of section 656.21(b)(5). Barry Briggs, 90-INA-143 (June 5, 1991). In its rebuttal the Employer submitted a second report from a different evaluating service which found the Alien's degree to be equivalent. The CO did not abuse his discretion in rejecting the Employer's second report evaluating the Alien's degree and finding in favor of the first report submitted by the Employer.

The Employer argues on appeal that the CO's reasoning that the combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers is "faulty in two ways: It fails to cite any appropriate legal basis for this assertion; and it creates confusion as to whether the certifying officer is challenging the employer's minimum requirements for the position or challenging the alien's lack of qualifications." (AF 2). The Employer's argument is faulty, however, in that it is the fact that the Alien lacks the qualifications that brings into question whether these are in fact the actual minimum requirements for the job. The Employer was requested to prove that the Alien's degree was the equivalent to the degree now being required. Employer's response was to submit an evaluation which indicates that the Alien's experience is equivalent to the degree being required.

The Alien in this case does not have a degree in Electronic Technology, but instead could only qualify for this job, because the Employer also indicated that a degree in Education Technology would be acceptable. The Alien just happens to have a degree in Education Technology.

We have held in *Francis Kellogg, et als.*,94-INA-465, 94-INA-544, 95-INA-68 (Feb. 2, 1998) (*en banc*) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of §652.21(b)(5).

In as much as Employer's stated minimum requirement was a "B.S. or equivalent" degree in Electronic Technology or Education Technology and the Alien did not meet that requirement, labor or certification was properly denied.

Order

The Certifying Officer's denial of labor certification is affirmed.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge
San Francisco, California

In re: Hong Video Technology
Case No. 1998-INA-202
Judge Huddleston, concurring:

I concur in the result reached by the majority. However, I write separately, as I believe there are subtle differences in our analysis of this case which are important.

The application for labor certification listed as minimum education requirements, a B.S. or equivalent in Electronic Technology or Education Technology. The application additionally required one year of experience in the job offered. (AF 95).

The notice of findings (AF 74-77) proposed denial on the grounds that the alien did not possess the **experience** required by the Employer, and on the grounds that the alien did not have the required **degree** in Electronic Technology or Education Technology. The CO cites a report from "Foreign Credentials Evaluations, Inc." as indicating that the Alien had the equivalent of an Associate of Arts in Education Technology. Therefore, the CO proposed denial on the grounds that the Employer was in violation of § 656.21(b)(5), in that the Alien did not meet the education or experience requirements of the application.

The Employer submitted evidence in rebuttal to establish that the Alien has the **degree** equivalent of a "U.S. baccalaureate degree in Electronics Engineering (Technology)." (AF 40). The Employer's rebuttal evidence consisted of a report by the Center for Education and Experience Evaluation, Atlanta, Georgia, entitled "Education & Experience Evaluation Committee Report for Mr. Pingjiang Liu." (AF 47). The Employer did not present any rebuttal evidence to establish that the Alien had the required **experience** of one year in the job offered.

The Final Determination (AF 4-5) denied the application on the grounds that Employer had not established that the Alien met the requirement of a B.S. degree. The CO noted that the new evaluation of the Alien's education requirements submitted in rebuttal opined that Alien met the degree requirement based upon a combination of education and experience. The CO then held that "A combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers."[2] Therefore, the application was denied.

As the CO's final determination did not preserve the NOF finding that the Alien did not have the required one year of experience in the job offered, that finding was not preserved for purposes of this appeal.[3] Thus, I

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[2] Interestingly the CO then observed that "In addition, because the employer/attorney used a different Evaluation service for the second evaluation it would appear that the employer has sought out a service that would provide a favorable evaluation tailored to the alien's qualifications." (AF 5). If the CO is of the opinion that such practice is in violation of the regulations, he is mistaken. Indeed, it is not expected that competent counsel would submit evidence which is unfavorable to his client.

[3] It is unclear why the CO found in the NOF that the alien did not have one year of experience in the job offered. The Alien's statement of qualifications (ETA form 750b, AF 121-122), lists work for the Employer in the job offered from 1995 to the present. However, this experience with the Employer cannot qualify him for the job. Further, the form lists 9 months of work for "Linkups Invest Trade" as an electronics engineer, and 14 years of work for Nanjing University in Nanjing China as "Electronic Engineer/Product Support." A comparison of the job duties listed on the application (AF

would find that the issue preserved in this appeal is whether the Employer has rebutted that the Alien meets the degree requirement.

The majority opinion notes that the NOF requested documentation that the Alien's degree is equivalent to a B.S. degree; and notes that the Employer submitted a second evaluation in rebuttal which found the Alien's degree to be equivalent. The majority then finds that "The CO did not abuse his discretion in rejecting the Employer's second report evaluating the Alien's degree and finding in favor of the first report submitted by the Employer." This appears to be a finding that the CO's rejection of the second report (submitted in rebuttal) is supported by substantial evidence.[4]

The Employer's evidence in rebuttal clearly states that "Mr. Liu's knowledge, expertise and professional experience appear to be equivalent to a U.S. baccalaureate degree in Electronics Engineering (Technology) and appear to qualify him to fill the position of Product Support and Electronics Engineer at Hong Video Technology, Inc., Atlanta, Georgia, U.S." (AF 49).

One reason cited by the CO for rejecting this opinion was that the CO believed that Employer's Counsel has "sought out a service that would provide a favorable evaluation tailored to the alien's qualifications." (AF 5). This reason is both arbitrary and capricious and is not supported by the evidence of record. Therefore, I would find that the CO's rejection of the rebuttal evidence on this grounds is not supported by substantial evidence.

The CO also rejects the rebuttal evidence finding that "a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers."

A careful examination of the application (ETA form 750a, AF 95) reveals that the Employer has worded the application as if he would accept two alternatives with respect to the degree requirement. First, the Employer states that a B.S. degree is required **or equivalent**. Thus, the Employer has stated that an applicant may either document a B.S. degree, or he may document that he has the equivalent of a B.S. degree. Second, the Employer states that the degree must be in Electronic Technology or alternatively in Education Technology.[5]

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95), with the duties performed by the Alien in his prior 15 years of employment (AF 122 and attachment), in my opinion, establishes that the Alien has extensive experience in performing the duties of the job offered. Therefore, I would find that the Alien also has the required one year of experience in the job offered.

[4] It is noted that the regulations are silent, and the Board has never considered *en banc* whether our standard of review is *de novo* or is a substantial evidence review.

[5] The Alien's statement of qualifications (AF 121) indicates that he received an associates degree in Electronic Technology in 1976. Further, he has taken 3 years of courses in Education Technology (1984-1987) but did not receive a degree or certificate. Finally, he received a certificate in Computer Graphics as a result of 10 months of study in 1989. It does not indicate that a B.S. degree was obtained in any field.

The wording of this requirement is highly significant as it appears the Employer is willing to accept the equivalent of a B.S. degree, but that it must be in Electronic Technology or Education Technology. Thus, it is unclear, for example, whether an applicant with a B.S. in Electrical Engineering would qualify. Similarly, it is unclear whether an applicant who has no formal education beyond high school, but who has performed the job duties for 25 years could qualify.

The Employer has conceded that the Alien does not have bachelor's degree, but argues that he has the equivalent of the required degree, based upon his extensive work experience plus his formal education preparation. (Letter submitting rebuttal at AF 40). Clearly, the Employer has asserted that an applicant may qualify with a B.S. degree or its equivalent. Any applicant (including U.S. applicants) could qualify if they possessed a B.S. degree, or if by a combination of education and experience had the equivalent of a B.S. degree. Under the facts of this case, I would find that the CO's rejection of the rebuttal evidence on this grounds is not supported by substantial evidence.

Moreover, I would find that in a *de novo* review of this evidence (if that is our standard of review) the evidence establishes that the Alien has the equivalent of a B.S. degree. The Alien has a total of approximately 7 years of education, receiving an associates degree and a certificate, plus 15 years of work experience in the job duties, plus an opinion from an evaluation service that the education and experience equates to a B.S. degree.

However, this does not end the inquiry. As the majority notes, we have considered the issue of alternative requirements in *Francis Kellogg, et als.*, 94-INA-465, 94-INA-544, 95-INA-68 (Feb. 2, 1998) (*en banc*). The Alien in this case does not meet the requirement of a B.S. degree, but only potentially qualifies for the job because the Employer has chosen to accept the equivalent of a B.S. degree. Therefore, under our analysis in *Kellogg* the Employer's alternative of accepting the equivalent of a B.S. degree is unlawfully tailored to the alien's qualifications, in violation of § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable.

While the Employer did indicate that the equivalent of a B.S. was acceptable, it was limited only to those applicants who could show a degree or equivalent in Electronics Technology or Education Technology. There is nothing in the record to indicate why a degree in Education Technology would be considered suitable for a job as an Electronic Engineer, except that the Alien has three years of course work in Education Technology. We have no reason to believe that there are not other alternatives to Electronics Technology which would render an applicant suitable to perform these job duties. As such, the Employer's limitation to only those two degrees is in violation of § 656.21(b)(5) under our analysis in *Kellogg*.[6]

Based upon the foregoing, I concur that the application for labor certification should be denied.

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[6] While CO's NOF did not cite our decision in *Kellogg*, it did cite a violation of § 656.21(b)(5). Therefore, a remand for consideration in light of our decision in *Kellogg* is not necessary.

RICHARD E. HUDDLESTON
Administrative Law Judge